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Supreme Court of California
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No. S258191

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

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**GERARDO VAZQUEZ, GLORIA ROMAN, and JUAN AGUILAR, on behalf of themselves and all other similarly situated,**

*Plaintiffs and Appellants*,

vs.

**JAN-PRO FRANCHISING INTERNATIONAL, INC.**,

*Defendant and Respondent*.

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Review of Certified Question from the
U.S. Court of Appeals for the Ninth Circuit
No. 17-16096

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# BRIEF *AMICI CURIAE* CALIFORNIA EMPLOYMENT LAW COUNCIL AND EMPLOYERS GROUP IN SUPPORT OF RESPONDENT

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## I. INTRODUCTION

This Court's decision in *Dynamex Operations West, Inc. v. Superior Court,* 4 Cal. 4th 903 (2018), fundamentally and without warning changed the law — so fundamentally that the decision should apply prospectively only.

This Court's multifactor test in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations,* 48 Cal. 3d 341 (1989), had been the determinative test for independent-contractor status in California for almost two decades. The *Borello* test cited *control* — who controlled the means and manner of doing the work — as the primary and normally determinative factor. But *Borello* also identified approximately 10 other relevant factors. Thereafter, the California Labor Commissioner, in published guidance for employers, restated that *Borello* was the law.

The new ABC test, however, wholly ignored the following eight *Borello* factors:

- "Right to discharge at will, without cause"; "not severable or terminable at will by the principal" (48 Cal. 3d at 350, 351 n.5);
- "The skill required in the particular occupation" (*id.* at 351);
- "Whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work" (*id.*);
- "The alleged employee's investment" (*id.* at 355);

- "The method of payment, whether by the time or by the job" (*id.* at 351);
- "Whether or not the parties believe they are creating the relationship of employer-employee" (*id.*);
- "Opportunity for profit or loss depending on . . . managerial skill" (*id.* at 355); and
- "Employment of helpers" (*id.*).

*Dynamex*'s new ABC test ignored those factors, but elevated to case-determinative status two factors that *Borello* had labeled as "secondary":

- "Whether the one performing services is engaged in a distinct operation or business" (*id.* at 351); and
- "Whether or not the work is part of the regular business of the principal" (*id.*).

The change from the *Borello* multifactor test to the *Dynamex* ABC test will change the result in most employee/independent-contractor cases. A high percentage of persons properly deemed independent contractors under *Borello* will be found to be employees under ABC.

The ABC test was not foreseeable; it was not even at issue in *Dynamex*. None of the parties proposed the ABC test. The trial court and court of appeal made no reference to the ABC test. Long after the case had been briefed to this Court, the Court *sua sponte* broached the ABC test by

requesting supplemental briefing from the parties over an issue that no party had raised.

Whether *Dynamex* applies retroactively implicates due process and equal protection. Employers relied, not only on this Court's adoption of the multifactor *Borello* test, but on the Labor Commissioner's interpretive guidance. It offends due process for such employers now to be subject to mammoth liability for following what they thought was settled law.

This Court therefore should hold that *Dynamex* applies prospectively only. Nonretroactivity fits comfortably within this Court's previous cases. In *Claxton v. Waters*, 34 Cal. 4th 367 (2004), for example, the Court held that its decision applied prospectively only, based on "the reasonableness of the parties' reliance on the former rule." *Id.* at 378. "The rule we are changing is one that parties in this and other cases may have relied . . . . ," this Court explained. *Id.* at 379. "Denying retroactive application will not unduly impact the administration of justice because it will merely permit a gradual and orderly transition" to the new rule of law. *Id.* The same is true here.

## II. INTEREST OF *AMICI*

*Amicus* California Employment Law Council ("CELC") is a voluntary, non-profit organization that promotes the common interests of employers and the general public in fostering the development in California of reasonable, equitable, and progressive rules of employment law.

CELC's membership includes approximately 80 private-sector employers in the State of California who collectively employ well in excess of a half-million Californians. CELC has been granted leave to participate as *amicus curiae* in many of California's leading employment cases.[1]

*Amicus* Employers Group is the nation's oldest and largest human resources management organization for employers. It represents nearly 3,800 California employers of all sizes and every industry, which collectively employ nearly 3,000,000 employees. The Employers Group has a vital interest in seeking clarification and guidance from this Court for the benefit of its employer members and the millions of individuals they employ. As part of this effort, Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships. Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal forums over many decades, Employers Group is uniquely able to assess both the impact and implications of the legal issues presented in employment cases such as this one, and accordingly, has been involved as *amicus* in many significant

[1] *See, e.g.*, *Alvarado v. Dart Container Corp.*, 4 Cal. 5th 542 (2018); *Kilby v. CVS Pharmacy, Inc.*, 63 Cal. 4th 1 (2016); *Duran v. U.S. Bank, N.A.*, 59 Cal. 4th 1 (2014); *Harris v. City of Santa Monica*, 56 Cal. 4th 203 (2013); *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012); *Harris v. Superior Court*, 53 Cal. 4th 170 (2011); *Chavez v. City of Los Angeles*, 47 Cal. 4th 970 (2010); *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272 (2009); *Jones v. Lodge at Torrey Pines P'ship*, 42 Cal. 4th 1158 (2008); *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094 (2007).

employment cases.[2]

Numerous CELC and Employer Group members[3] relied on the *Borello* multifactor test in entering into independent-contractor relationships in a wide variety of contexts. They should not now be faced with retroactive liability because of the dramatic and unanticipated change from the *Borello* multifactor test to the *Dynamex* ABC test.

## III. *DYNAMEX* SO FUNDAMENTALLY CHANGED THE LAW THAT IT SHOULD NOT APPLY RETROACTIVELY

### A. Employers And Individuals Alike Relied On The *Borello* Rule.

A simple hypothetical explains why *Dynamex*, which dramatically changed the law, should not be retroactive.

Consider a small manufacturing company ("Smallco"). It historically delivered its products to its customers via UPS. Ten years ago, one of its valued hourly employees informed Smallco that he had been a

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[2] *See, e.g., Duran v. U.S. Bank, N.A.*, 59 Cal. 4th 1 (2014); *Reid v. Google Inc.*, 50 Cal. 4th 512 (2010); *McCarther v. Pacific Telesis Grp.*, 48 Cal. 4th 104 (2010); *Chavez v. City of Los Angeles*, 47 Cal. 4th 970 (2010); *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272 (2009); *Arias v. Superior Court*, 46 Cal. 4th 969 (2009); *Amalgamated Transit Union v. Superior Court*, 46 Cal. 4th 993 (2009); *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008); *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007); *Prachasaisoradej v. Ralphs Grocery Co.*, 42 Cal. 4th 217 (2007); *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094 (2007).

[3] Respondent Jan-Pro Franchising International, Inc. is not a member of CELC or Employers Group.

driver in the military, and that he and his two siblings, as independent contractors, could make the local deliveries instead of UPS.

He told Smallco that there would be no investment by it, because the siblings could use their personal vehicles, and that they would do the deliveries for 10% less than UPS charged. Smallco's CEO checked with her sister, a prominent employment lawyer ("Competent Counsel"), who advised that the relationship would satisfy the *Borello* independent-contractor standards. In particular, Competent Counsel advised that the primary *Borello* factor — who controlled the means and manner of doing the work — was easily met, because the independent contractor would take possession of the products and then decide for themselves when and how to deliver them. Furthermore, Competent Counsel cited the eight *Borello* factors listed above (which *Dynamex* later discarded); all eight either were neutral or pointed to a bona fide independent-contractor relationship. Smallco's CEO relied upon the advice of Competent Counsel and accepted the proposal by the driver and his two siblings. The arrangement was a "win-win": Smallco saved money, and the three siblings made far more than what they had earned previously in their old jobs.

Immediately following *Dynamex*, however, Competent Counsel advised Smallco that the arrangement flunked the new ABC test. Competent Counsel's prior opinion rested on the fact that the *Borello* test's primary factor was control over the means and manner of doing the work,

and the secondary factors overwhelmingly favored independent-contractor status. However, Competent Counsel now opined that, under *Dynamex*, the eight secondary factors on which she previously had relied were no longer part of the test, and two of the secondary factors — parts (B) and (C) of the *Dynamex* test — now had been elevated to be independently determinative. Because delivering Smallco's products to customers was "part of the regular business" of Smallco, under *Dynamex* the siblings no longer were independent contractors.

Law-abiding Smallco told its independent contractors it unfortunately could not continue the relationship, but it offered to rehire them in hourly-paid delivery jobs as employees. They declined and sued Smallco, alleging that under *Dynamex* they had been misclassified all along. They sued under the Unfair Competition Law (Civil Code section 17200 *et seq.*), the IWC Wage Order, the Labor Code, and the Private Attorneys General Act (PAGA). They claimed four years of lost wages, lost overtime, meal premiums, rest premiums, automobile expenses, Labor Code section 226 penalties (for wage statements), Labor Code section 203 penalties (for wage continuation after termination), PAGA penalties and attorneys' fees, with total demands for the three of them well into seven figures.

Does Smallco, which at all times sought to comply with the law, win? The answer should be yes, because any other answer would offend

due process and equal protection.

### B. The Hypothetical Is Not Hypothetical.

Numerous CELC members have relied on the *Borello* multi-factor test in entering into independent-contractor relationships. One CELC member has facts that are even more compelling than the Smallco hypothetical. This company, like Smallco, had to get its product delivered to customers. It could have used UPS or FedEx, but chose its own independent contractors. It obtained legal opinions from legal experts that, under *Borello*, it had properly classified its independent contractors. It was nevertheless sued in a hotly contested class action. The class action was tried to verdict before a prominent arbitrator, a retired justice of the California Court of Appeal. The arbitrator in the lengthy opinion found that the drivers were properly classified as independent contractors. He relied on *Borello*, finding that the drivers controlled their own means and manner of doing the work. He further relied on the eight *Borello* factors that *Dynamex* now has abandoned. He found particularly significant the following *Borello* secondary factors: (1) entrepreneurial opportunities; (2) investment by the independent contractors; and (3) the fact that the independent contractors did not need to do the work personally, but could hire their own employees ("helpers"). The federal district court enforced the arbitrator's award, and the Ninth Circuit affirmed.

Similar examples abound. Employers and employees throughout

California relied on *Borello* as settled law.

### C. ***Dynamex* Dramatically Changed The Rules.**

Commentators immediately following *Dynamex* recognized that there had been a fundamental change in California law. Under the heading "High Court Tightens Rules On Classifying Contractors," the *Los Angeles Times* on May 1, 2018, wrote in a page 1 story:

> In a ruling that could change the workplace status of people across the state, the California Supreme Court made it harder Monday for employers to classify their workers as independent contractors.
>
> The unanimous decision has implications for the growing gig economy . . . but it could extend to nearly every employment sector.
>
> * * * *
>
> The ruling is likely to lead many employers in California to immediately question whether they should reclassify independent contractors rather than face stiff fines for misclassification, employment lawyers said.

Bloomberg BNA's *Daily Labor Report*, for decades the most trusted source of information for employment-law practitioners, wrote that the decision was regarded as a "bombshell"; "California . . . has so dramatically changed its test that many . . . companies today might be misclassifying workers that were lawfully classified yesterday," Bloomberg BNA quoted an expert as saying. "Calif. Supreme Court Transforms Test for Who Is an Employee," April 30, 2018 (p. 4).

### D. Prospective Application Of The New ABC Test Fits Comfortably Within This Court's Retroactivity Precedents.

*Claxton v. Waters*, 34 Cal. 4th 367 (2004), was an employment case. An employee had sued for sexual harassment and filed a related workers' compensation claim. The employee then settled the workers' compensation claim, a settlement that the employer reasonably believed (based on prior cases) settled the sexual harassment claim along with it. This Court held that workers' compensation settlements cannot release sexual harassment claims, but made the decision prospective only: "Particular considerations relevant to the retroactivity determination include the reasonableness of the parties' reliance on the former rule, the nature of the change as substantive or procedural, retroactivity's effect on the administration of justice, and the purposes to be served by the new rule." *Id.* at 378-79 (citations omitted). This Court cited the reasonableness of reliance: "The rule we are changing is one that parties in this and other cases may have relied on . . . ." *Id*. at 379. The Court continued: "Denying retroactive application will not unduly impact the administration of justice because it will merely permit a gradual and orderly transition" to the new rule of law. *Id.*

In *Estate of Propst v. Stillman*, 50 Cal. 3d 448 (1990), this Court noted: "The circumstance most strongly militating against full retroactivity of our present holding is its unforeseeability to counsel." *Id.* at 463. The

case was remanded to allow the parties seeking prospective application to prove reasonable reliance.

*Woods v. Young*, 53 Cal. 3d 315 (1991), made a decision prospective only, with this Court explaining: "Unlike statutory enactments, judicial decisions, particularly those in tort cases, are generally applied retroactively. But considerations of fairness and public policy may require that a decision be given only prospective application." *Id.* at 330 (citations omitted).

*Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95 (2006), involved the practice of recording interstate telephone calls with the consent of some (but not all) parties. The Court held that California law (which required the consent of all parties) applied to these interstate calls, even if the calls were placed from outside the state. But the Court made its ruling prospective, even though "one legitimately might maintain that [Salomon Smith Barney] reasonably should have anticipated that its recording of a telephone conversation with a California client when the client is in California would be governed by California law, regardless of where the [Salomon] employee with whom the client is speaking happens to be located." *Id.* at 129. This Court concluded, however, that "prior to our resolution of the issue in this case a business entity reasonably might have been uncertain as to which state's law was applicable and reasonably might have relied upon the law of the state in which the [Salomon]

employee was located." *Id.* at 130. This Court recognized that some legal claims would be barred unless the new decision applied retroactively. This Court held, however, that "denying the recovery of damages for conduct that was undertaken in the past in ostensible reliance on the law . . . will not seriously impair California's interests." *Id. See also Camper v. Workers' Comp. Appeals Bd.*, 3 Cal. 4th 679, 688 (1992) (decision applied prospectively only, because reliance on the former rule of law was reasonable).

The teaching of those cases applies directly here. Retroactive application of *Dynamex* would penalize those who relied on this Court's prior statement of the law.

## IV. CONCLUSION

Whatever may be the correct rule of independent-contractor law, it simply is unfair — indeed, it offends due process — to impose mammoth retroactive liability on thousands of law-abiding employers, large and small, that conducted their prior businesses based on law universally endorsed by the California judiciary and the Labor Commissioner. *Dynamex* fundamentally changed the law; what it did in real-world terms is no different from the Legislature enacting a new statute. Indeed, the California Legislature in 2019 crafted a bill, AB 5, to codify the ABC test by statute (with some exemptions). The statutory change underscores the dramatic change in law created by *Dynamex*. Statutes, of course, operate

prospectively only. This is one more reason why this dramatic change in law should not be retroactive. It would be grossly unjust to impose huge retroactive liability on law-abiding employers like Smallco, who relied upon what this Court and the Labor Commissioner had said the law to be.

Respectfully submitted,

DATED: April 20, 2020

PAUL HASTINGS LLP

By: 

Paul W. Cane, Jr.

Attorneys for *Amici Curiae*
CALIFORNIA EMPLOYMENT LAW COUNCIL
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## CERTIFICATE OF COMPLIANCE

In accordance with California Rule of Court 8.520(c)(1), counsel for *Amici Curaie* California Employment Law Council and Employers Group hereby certify that this **BRIEF *AMICI CURIAE*** is proportionately spaced, uses Times New Roman 13-point typeface, and contains 2,751 words, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, as determined by our law firm's word processing system used to prepare this brief.

Respectfully submitted,

DATED: April 20, 2020

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/s/Paul Cane

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Last Name, First Name (PNum)

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Law Firm